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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-195783

DATE: October 2, 1980

MATTER OF: Aubrey P. Wilkerson - [Dual Pay From More
Than One Position]

DIGEST: Employee was employed by Doorkeeper of House of Representatives from February 1, 1955, to April 1, 1973, when he transferred to Office of the Architect of the Capitol and worked on the night shift until separated January 12, 1979. Concurrently from February 12, 1973, he was also employed by District of Columbia Public Schools. Latter employment violated 5 U.S.C. § 5533(c)(1) which prohibits pay from more than one position when aggregate gross pay of positions exceeds \$7,724. Pay which employee received from District of Columbia Public Schools for period of dual employment was erroneous payment for which he is indebted to District of Columbia government.

This decision is rendered in response to a request by George M. White, the Architect of the Capitol, for a decision as to whether Aubrey P. Wilkerson is indebted to the United States for having received pay from more than one position in violation of section 5533(c)(1) of title 5, United States Code. This section prohibits the use of appropriated funds to pay an individual for more than one position if the pay of one of the positions is paid by the Clerk of the House of Representatives or if one of the positions is under the Office of the Architect of the Capitol and the aggregate gross pay (annual rate of pay) from the positions exceeds \$7,724. This law applies to positions in the legislative, executive, or judicial branch of the Government of the United States or in the government of the District Columbia. 5 U.S.C. § 5531(2).

Mr. Wilkerson was employed as a custodian by the Doorkeeper of the House of Representatives from February 1, 1955, until April 1, 1973. He was then transferred to the Office of the Architect of the Capitol where he was employed as a full-time laborer

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assigned to the cleaning force night shift until he was terminated on January 12, 1979. Concurrently from February 12, 1973, Mr. Wilkerson was also employed by the District of Columbia Public Schools - initially as a school maintenance worker and later as a general maintenance repairman.

We are advised that Mr. Wilkerson was being paid at the annual rate of \$5,701.80 by the House of Representatives on February 12, 1973, when he accepted employment with the District of Columbia Public Schools at an annual rate of \$7,488. Thus, his aggregate gross pay from the two positions was \$13,189.80 - well in excess of the statutory limit of \$7,724. Moreover, his pay from both jobs steadily increased and the limit was exceeded throughout the entire period of his dual employment which lasted from February 12, 1973, through January 12, 1979. Consequently, Mr. Wilkerson was employed in two positions in violation of 5 U.S.C. § 5533(c)(1) for nearly 6 years.

The remaining issue is whether Mr. Wilkerson is indebted to the United States for the pay received from the House of Representatives and the Architect of the Capitol or to the District of Columbia for the pay received from the District of Columbia Public Schools.

The question of which position erroneous payments arise from was considered in 19 Comp. Gen. 751 (1940) and 32 *id.* 448 (1953). As they have been construed, these decisions hold that, when an employee holding one position is appointed to another position in violation of dual compensation or dual employment laws, a presumption arises that the employee intended to give up his first position. In these circumstances the employee is entitled to retain the pay of the second position and he must return any pay received from the first position during the period of dual employment. However, when the facts rebut any presumption of intent to give up the first position a different situation arises. Then the appointment to the second position may not be given effect during the period of dual employment and any pay received from the second

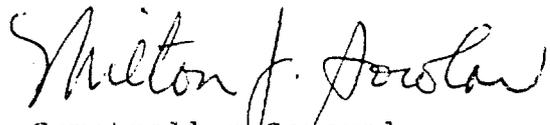
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position during this period is an erroneous payment of pay for which the employee is indebted.

The case at hand falls in the second category. Mr. Wilkerson retained his position with the Door-keeper of the House of Representatives for nearly 2 months after his appointment to the position with the District of Columbia Public Schools and he continued in a similar position at night in the Office of the Architect of the Capitol for well over 5 years thereafter. These facts clearly rebut any presumption that he intended to abandon his other Government employment when he accepted the position with the District of Columbia Public Schools.

Therefore, it is our opinion that Mr. Wilkerson's employment by the District of Columbia Public Schools from February 12, 1973, through January 12, 1979, violated 5 U.S.C. § 5533(c)(1) and that any pay he received from such employment during that period was an erroneous payment for which he is indebted to the District of Columbia.

Accordingly, this matter is referred to the government of the District of Columbia for the collection of this indebtedness or such other action as may be found appropriate. While this indebtedness may not be considered for waiver under 5 U.S.C. § 5584 since this section does not apply to the government of the District of Columbia, it may be considered for waiver under section 2901 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, March 3, 1979 (section 1-359.1, District of Columbia Code, 1973 Edition, Supplement VII, 1980).



For the Comptroller General
of the United States